

draw a clear distinction between the two. I do not think that a matter of this kind can be classed as a mere irregularity in view of decided cases. I think therefore that the conviction must be quashed.

Appeal allowed. Conviction quashed.

[APPELLATE CRIMINAL JURISDICTION]

GORDON-SMITH, Ag. J.A.

October 27, 1939.

PUBLIC PROSECUTOR v. CHIN YOKE.

[PAHANG MAGISTRATE'S CRIMINAL

APPEAL No. 4 of 1939]

Road Traffic Enactment, 1937, Ss. 13 (i), 44 (i)—driving a motor cycle without being licensed—taking a motor cycle without owner's consent—proof of absence of licence—onus—Criminal Procedure Code (Cap. 6), S. 173 (f)—summary trials—no prima facie case established—duty of Magistrates.

In a prosecution for an offence of doing something for which a licence is required under the Road Traffic Enactment it is unnecessary to call a licensing officer to prove the non-issue of the licence. The burden is on the accused to negative the averment of being unlicensed, by producing his licence.

In a summary trial, if the magistrate is satisfied that, if rebutted, the evidence led by the prosecution would warrant the accused's conviction, then a *prima facie* case has been made out against him. In such a case the accused should be called upon to answer the *prima facie* case made out against him. If, however, on the other hand, after weighing up such evidence for the prosecution, the magistrate is satisfied that it would be wholly unsafe to convict upon such evidence standing alone, then no *prima facie* case has been made out and the accused should not be called on for his defence.

Cases referred to:—

- (1) *Public Prosecutor v. Lee Pak*, (1937) M.L.J. 265.
- (2) *Rex v. Kakelo*, (1923) 2 K.B. 795.

MAGISTRATE'S CRIMINAL APPEAL.

The Respondent in this case was charged at the Magistrate's Court, Raub, on the 14th September, 1939, with the following offences—

- (a) Section 13 (1) of the Road Traffic Enactment, 1937 and punishable under section 118 (1) of the said Enactment;
- (b) Section 44 (1) of the Road Traffic Enactment and was acquitted and discharged without being called upon to defend.

Against this decision the Public Prosecutor appealed on the ground that the learned Magistrate

in coming to the conclusion that a *prima facie* case had not been made out against the Respondent was against the weight of evidence having regard to the fact that the Prosecution had, *inter alia*, adduced evidence

- (a) that the Respondent was driving a motor cycle;
- (b) that the Respondent failed to produce his licence when called upon to do so;
- (c) that the motor cycle in question was not the property of the Respondent;
- (d) that the motor cycle was driven by the Respondent without the consent of the owner.

At the hearing of the appeal the learned Judge allowed the appeal and ordered a new trial before another Magistrate.

T. D. Wallace, Assistant Legal Adviser, for Public Prosecutor, cited *Public Prosecutor v. Lee Pak*⁽¹⁾. Respondent in person.

Gordon-Smith, Ag. J.A.—This was an appeal by the Public Prosecutor against the decision of the Magistrate in acquitting and discharging the Respondent. The Respondent was charged—

- (a) under Section 13 (i) of the Road Traffic Enactment for driving a motor cycle and not being licensed, and
- (b) under Section 44 (i) of the same Enactment for taking away a motor cycle without the consent of the owner.

After recording the evidence of a Police Sergeant and a Police Constable and also the owner of the motor cycle in question, and after an adjournment, the Magistrate, without calling on the accused for his defence, acquitted and discharged the accused. In his grounds of judgment the learned Magistrate stated that the identification of the rider of the motor cycle was extremely weak, that the licensing officer should have been called to prove the non-issue of a licence to the accused, and that he was of the opinion that no *prima facie* case had been made. He therefore acted under section 173 (f) of the Criminal Procedure Code and acquitted and discharged the accused.

The evidence of the Sergeant (with whom was the Police Constable) was to the effect that he had known the accused for 2½ years and he saw him approaching on a motor cycle in a zigzag manner and suspected that he had no licence, as accused also had difficulty in changing gear. The rider passed them and failed to stop although shouted at and the Sergeant

and Police Constable followed. They found the motor cycle abandoned in Market Street and accused was arrested in Bibby Street.

The owner of the motor cycle gave evidence that he had left the motor cycle in question outside his house near Market Street and that he knew accused by sight only and that he had not given him permission to take away the motor cycle.

In view of the evidence of the Sergeant and Police Constable, it is difficult to agree with the Magistrate's opinion that the evidence as to identity was extremely weak. I allowed the appeal and ordered a new trial before another Magistrate.

Two points arose on the appeal and on which it may be helpful to Magistrates to have a written Judgment.

The first is as to the necessity or otherwise of calling a licensing officer to prove the non-issue of a licence where an accused is charged with the offence of doing something for which a licence is required by law.

In this respect Section 106 of the Evidence Enactment, Cap. 10, is relevant and reads as follows:—

"When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

The second illustration to the section also specifically applies both to civil and criminal case and casts on a person the proof of shewing that he is qualified to do some act which, but for such qualification, is prohibited. This section and others of a similar nature codify what is and has been for years the English law in this respect. Supposing a man is prosecuted in England for carrying a gun, or shooting game without a licence, it would be absurd to attempt to produce every postmaster or sub-postmaster in England (who are authorised to issue such licences) to prove that the accused had not been issued with the necessary licence. The burden is, of course, on the accused to negative the averment of being unlicensed, by producing his licence. Similarly in the case of an alien. It is not necessary for the prosecution to prove that an alleged alien has not been granted a certificate of naturalization but it is for the alleged alien to produce such certificate. *Rex v. Kakelo*⁽²⁾.

Further, under the Road Traffic Enactment sections 17 and 39, the production of a licence may be demanded and an offence is committed if a person duly licensed, fails to produce the same. Accused, however, was not charged in this respect, for the simple reason that apparently he had no licence to produce.

The second point is as to when a Magistrate is justified in acting under section 173 (f) of the Criminal Procedure Code. This paragraph reads as follows:—

"If, upon taking all the evidence hereinbefore referred to" (i.e. the evidence for the prosecution) "the Court finds that no case against the accused has been made out which if unrebutted would warrant his conviction, the Court shall record an order of acquittal."

Similar provision is also made by section 180, in the case of a trial by a Judge without Assessors, by section 190 in the case of a trial by a Judge with Assessors and by section 214 in the case of a trial by Jury. There is, however, a distinction to be drawn in respect of the last instance, to which I will refer later. A Magistrate is, therefore, in the same position as a Judge in the exercise of the powers conferred respectively by sections 173 (f), 180 and 190, the relevant wording of all three provisions being identical.

One is quite familiar with the course often adopted by Counsel for the Defence at the close of the case for the Prosecution (particularly in a trial with a Jury), when he submits that he has no case to answer, or in other words, that the Prosecution has failed to make out a "*prima facie*" case against the accused and it is submitted that accused should not be called on for his defence.

It is then that it is the duty of the Magistrate or Judge to consider the evidence already led and decide whether or not to call on the accused for his defence, and the question arises what is a *prima facie* case? In *Mozley and Whiteley's Law Dictionary* (5th Ed.) it states:

"A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side."

This follows very closely the actual wording of the sections referred to but it does not follow, in my opinion, that the Magistrate or Judge must necessarily accept the whole of the evidence for the prosecution at its face value. There may be good grounds for rejecting some part, or all of it and, therefore, it is necessary to weigh up this evidence and on so doing one may be satisfied that, if unrebutted, it would warrant the accused's conviction. In such case the accused is then called upon to answer the *prima facie* case which has thus been made out against him. If, however, on the other hand, after weighing up such evidence for the prosecution one is satisfied that it would be wholly unsafe to convict upon such evidence

standing alone, then no *prima facie* case has been made out and the accused should not be called on for his defence.

This is a question for decision by the Magistrate, and the Judge alone, even though the latter is sitting with Assessors.

In the case of a trial with a Jury, the matter is slightly different and the relevant section is worded differently. Section 214 of the Criminal Procedure Code is worded precisely the same as Section 204 of the Colony Criminal Procedure Code, and subsection (1) provides that the Court "if it considers that there is no evidence that the accused committed the offence shall direct the Jury to return a verdict of not guilty," but the words "no evidence" in this instance do not mean "no sufficient satisfactory, trustworthy or conclusive evidence" and it means what it says, i.e. that even if all the evidence given were perfectly true, it does not amount to legal proof that the accused committed the offence charged. It is, however, provided by sub-section (3) that at any time after the conclusion of the evidence for the prosecution the Jury may stop a case and find an accused not guilty if they consider the case to be one in which they could not safely convict. This is a power vested in the Jury which can be acted upon irrespective of the views held by the presiding Judge, and it is usually under this subsection that Counsel for an accused makes such submission. Whether Counsel can address the Jury on the point, does not appear to have been definitely decided but if he does, then no doubt Counsel for the Prosecution would be entitled to reply, apart from the Judge also expressing his views. It is, however, a power specifically conferred upon Juries and in the exercise of which they have an unfettered discretion.

Appeal allowed. New trial ordered.

[ORIGINAL CIVIL JURISDICTION]

GORDON-SMITH, J.

June 23, 1939.

N. M. JOSEPH v. LEN HUP & CO. & ANOR.

[SELANGOR CIVIL SUIT No. 99 of 1938]

Civil Procedure Code, Ss. 408, 409—service on person alleged to be a partner of defendant firm—denial of partnership—conditional appearance—application to set aside plaint and summons—whether application maintainable.

Where a summons and a plaint are served on a person alleged to be a partner and the person having management or control of the firm sued and the person so served denies that he is a partner the proper procedure is laid down in Section 409 of the Civil Procedure Code

under which he may file a written statement denying that he is a partner.

Case referred to:—

(1) *Sabatier v. The Trading Co.* (1927) 1 Ch. D. 495.

SUMMONS IN CHAMBERS.

Briggs for Kamaruddin bin Haji Ibrahim (applicant).

Applicant 'was served as 'partner and manager'. He entered appearance. It was 'conditional appearance'. That is in accordance with well-known English practice. He asks for service to be set aside. He refers to the English Practice.

Ramani (*Sen* with him) for the plaintiff (respondent).

On a preliminary point we submit this application is not maintainable. We have no 'conditional appearance' under our code. Cap. 33 Civil Procedure Code, Ss. 408 & 409. Its provisions are borrowed from Indian Order 30 Rules 7 & 8. Indian Rules have since been amended to provide for 'appearance under protest'. Here we still follow the old rule. Sections 408 & 409 indicate what should have been done. The reason of the rule is obvious. Civil Procedure Code should be construed as a complete Code on the law of procedure.

Briggs in reply refers to heading of Chapter XXXIII of the Code. Existence of partnership is essential. If no firm is in existence Sections 408 & 409 do not come in at all. *Sabatier vs. The Trading Co.*,⁽¹⁾.

Sections 408 & 409 are at best alternative procedure.

Gordon-Smith, J.—The Plaint in this suit is dated the 31st May 1938 and claims heavy damages against the abovenamed Defendants in respect of injuries arising out of a motor car accident. The Summons and Plaint were served on one Kamaruddin bin Haji Ibrahim as the partner of the 1st Defendant and as the person having the control and management of the 1st Defendant firm.

It was so served on the 23rd July 1938.

An appearance was entered for the 2nd Defendant on the 27th July 1938.

The same day, a conditional appearance was entered for the 1st Defendant "without prejudice to an application to set aside service of the summons and